No. 15385

In the
United States Court of Appeals
For the Ninth Circuit

DICK LEE EVANS,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

Appellant's Opening Brief

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JURISDICTION

This is an appeal from a judgment rendered and entered by the United States District Court for the Southern District of California, Central Division. The appellant was sentenced to custody of the Attorney General for a period of three months [R 8].[1] Title 18, Section 3231, United States Code confers jurisdiction in the district court over the prosecution of this case. This Court has jurisdiction of this appeal under Rule 27(a) (1) and (2) of the Federal Rules of Criminal Procedure. The Notice of Appeal was filed in the time and manner required by law [R 9].

[1]R refers to the printed Transcript of Record.

STATEMENT OF THE CASE

Appellant was indicted under U.S.C., Title 50, App. Sec. 462 (Universal Military Training and Service Act) for refusing to submit to induction [R 3-4].

Appellant pleaded Not Guilty, waived jury trial and was tried on July 23, 1956 [R 11], by Judge Thurmond Clarke. Appellant was convicted, and sentenced on August 6, 1956 [R 7-8].

At the close of the evidence, a Motion for Judgment of Acquittal was made, argued, and denied [R 6-7].

THE FACTS

Appellant registered with Local Board No. 115 on June 27, 1951 [Ex 1-2].[2] He filed the standard eight-page Classification Questionnaire on November 26, 1951 [Ex 4-12]. In it he showed he was a student of the ministry under the direction of the Watch Tower Bible and Tract Society, and also that he regularly served as a minister [Ex 6]; additionally he signed the paragraph wherein registrants are asked to declare if they are conscientious objectors to participation in warfare [Ex 10].

Subsequently, the demands of his new secular occupation, (long-distance truck driver) prevented him from regularly following the regimen of the Watch Tower Society, the *sine qua non* for being considered a "witness" of Jehovah by his brethren [Ex 48]. This,

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[2]Ex refers to a photocopy of the Government's exhibit (the selective service file of appellant) admitted in evidence by stipulation. The pagination is at the bottom of each sheet of the exhibit, circled.

he spelled out in a later questionnaire by explaining his answer "no" to the question, "Are you a member of a church, religious organization, or sect?" He stated: "To be a member you have to be active." On the same page [Ex 48] he showed he had become a "member" at eight years of age but, "I haven't been active in the preaching work or attending Bible Studies Regular, but that doesn't change the way I believe."

In the very first questionnaire he had indicated he was also a conscientious objector to participation in war [Ex 10], so the local board sent him the Special Form for Conscientious Objectors. He completed this form [Ex 13-17] and in the manner that distinguishes the Jehovah's witness conscientious objectors from the pacifist registrants, namely, by showing that his commitment to Jehovah precluded participation in *worldly, carnal* warfare, and that he believed in self-defense. [See Ex 18, as well as 16 and 14]. His explanation of his position on this latter subject was equivalent to that of the western states' law pertaining to self-defense [Ex 14 (5)].

His evidence in the Special Form for Conscientious Objectors showed that he believed in a Supreme Being [Ex 13, series II] and that he received his belief on this subject, and on conscientious objection, from his parents, from the age of seven [Ex 14 (3)]; that he relied on "Christ Jesus and Jehovah God for my guidance, and the Watch Tower Bible and Tract Society . . . " [Ex 14 (4)]; that he had discussed his views on conscientious objection publicly on several occasions [Ex

14 (7)]. He showed he had never been a member of any military organization [Ex 16 (series IV)]. He gave the names and addresses of four references, who could supply information as to the sincerity of his conscientious objections [Ex 7 (series V)], and he attached a thirty-one-page booklet entitled "Neutrality" [Ex 18-19],[3] in response to a request for the official creed of his religious sect on the subject of their opposition to participation in carnal warfare [Ex 16 (series IV 2e)].

No evidence, rebutting any of the above, nor any reflecting on his veracity or sincerity was before the local board, for none was ever reduced to writing by the local board and placed in the file, as the regulations require [32 C.F.R. 1623.1 (b)].

Nevertheless, the local board classified him, on February 13, 1952, in Class I-A [Ex 11]. No reason for the rejection of his conscientious objector claim was at that time placed in the file, although subsequently (June 14, 1955) this same board, in reconsidering his case, made a memorandum [Ex 54] wherein his views on self-defense, his ownership of a hunting-type rifle, his activity as a hunter, his willingness to haul "construction" material, his unwillingness to aid wounded soldiers and a question asked of him if fear was his mo-

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[3]When the Selective Service System prepares photocopies of a registrant's file, for trial use, it does not photocopy in full (for reasons of economy) multi-page printed publications submitted by the registrant during his administrative processing.

By agreement of counsel, appellant is lodging with the Clerk of this Court four complete copies of the 31-page booklet, "Neutrality", and is designating the document "Supplemental Exhibit."

tive (he gave a negative reply) were the elements, and the only elements of belief and/or conduct mentioned in the rejection memorandum.

Appellant timely perfected an administrative appeal from this I-A classification. Thereafter, for the first time, material adverse to his claim for a conscientious objection classification, came into the file: the FBI reports and the documents based on them [Ex 29-]. Although appellant's good character and veracity were never attacked, his sincerity was, by some. The irrelevant nature of the evidence supporting those attacks will be commented on during the argument, hereinbelow. His claim for a conscientious objector classification was rejected by the Appeal Board, on August 5, 1954 [Ex 23].

The local board thereafter, on its own initiative, gave him a new questionnaire. He promptly completed and filed it [Ex 48-51]; the board as promptly decided, "Reviewed but not reopened," on September 14, 1954 [Ex 11]. There was, in fact, nothing new concerning his status that he did or could submit.

Thereafter, the local board once more apparently reviewed his file, for it made the following entries: "May 10, 1955, Re-opening of case authorized by Operations Bulletin No. 123;" and "May 10, 1955, I-A KCW 3-0" [Ex 11]. On the same day (see Ex 11) the local board mailed appellant a standard Notice of Classification. It informs the recipient (see Ex 35) that he has ten days after a local board classification action to ask for an Appearance before Local Board and/or to appeal.

Appellant did neither. On June 1, 1955, the local board once again took the initiative and wrote appellant to come in for an interview. He appeared on the date specified by the board; the board's summary of the interview [Ex 54] indicates the narrow and, as argued hereinbelow, illegal nature of the inquiry.

On the same day, namely, June 14, 1955, the local board mailed him another notice card that he was reclassified in Class "I-A". Again he neither asked the Local Board for a formal Appearance before it, nor that the Appeal Board review his file. Then, on November 23, 1955, the Local Board sent him an Order to Report for Induction [Ex 11]. Appellant obeyed the order to the extent of appearing at the induction station, but there refused to submit to induction; his indictment and conviction followed.

During the trial, testimony concerning appellant's no-basis-in-fact and denial-of-due-process defenses, was admitted, subject to a ruling on the objection of the plaintiff, namely, that appellant was precluded from entering such "classification" defenses because he had not taken an administrative appeal from the I-A classification of May 10, 1955, and/or June 14, 1955. The testimony of the defendant was unrebutted.

QUESTIONS PRESENTED AND HOW RAISED

I.

The threshold question of availability of defenses is present.

The undisputed evidence is that this appellant was never classified in any class other than Class I-A, and that when he was first so classified, he perfected an administrative appeal and was kept in said class by the Appeal Board; that thereafter no relevant and material new, further, or additional evidence adverse to either of his conscientious objection claims, or favorable to a claim for any other classification was presented but that the local board subsequently again and yet again placed him in said Class I-A (and in no other); in sum, that he took only one administrative appeal.

The question presented may be stated as follows: "Is a defendant, in a felony selective service prosecution, precluded from presenting classification and/or due process defenses where the record shows he perfected an administrative appeal from only the first of three I-A classifications, absent intervening, relevant and material evidence?" Stated more argumentatively: May a local board, by repetitively reclassifying a registrant in the same class, without intervening new evidence, require repetitive, and obviously vain, appeals?

This question was squarely raised by both counsel [R 12, 15].

II.

Concerning the no-basis-in-fact defense:

It is appellant's position that there was no basis in fact for classifying him in Class I-A in the face of the undisputed evidence supporting his claim for a I-O and/or I-A-O classification.

This question was raised by Motion for Judgment of Acquittal [R 6-7].

III.

Concerning denial of due process:

It is appellant's position that the evidence shows that false, artificial and illegal standards were used by the Selective Service System (and by the Department of Justice recommending officials) in denying appellant at least a I-A-O classification, to his prejudice.

This question was raised by the Motion for Judgment of Acquittal [R 7].

SPECIFICATION OF ERRORS

I.

The district court erred in failing to grant the motion for judgment of acquittal.

II.

The district court erred in convicting the appellant and entering a judgment of guilty against him.

SUMMARY OF ARGUMENT

POINT I.

APPELLANT WAS NOT REQUIRED TO REPETITIVELY APPEAL THE I-A CLASSIFICATIONS, THERE BEING NO RELEVANT NEW EVIDENCE, AND THEREFORE HE IS ENTITLED TO HAVE HIS DEFENSES CONSIDERED.

That Evans did not repetitiously appeal does not make the rule of exhaustion of administrative remedies applicable. The Supreme Court and other cases are reviewed in the argument to show that the rule is not ironclad and that it has many types of exceptions.

The facts of his case bring Evans within several of the recognized exceptions. No relevant and material new evidence appears in the file between the time Evans first perfected an appeal and the time he was repetitiously reclassified in the same class, 1-A. All of this Court's decisions and the Supreme Court's on this subject of exhaustion are distinguishable: all are either where the registrant never once appealed anything, or where there were intervening, different classifications, with intervening additional factual matters.

Evans was not required to do a vain thing. Reason and the cases cited in the argument support this view.

Moreover, the nature of his defenses bring him within the recognized exceptions to the rule. Finally, the rules of the Selective Service System itself favor the position that no appeal was required because its rule states that the registrant had no right of appeal after

his reclassification. See Local Board memorandum 52, Par. 3(a). Therefore, his following two defenses should be considered on their merits.

POINT II.

DENIAL OF THE CONSCIENTIOUS OBJECTOR STATUS WAS WITHOUT BASIS IN FACT

Appellant showed the local board that he opposed participation in noncombatant and combatant military service. His professions were that he believed in a Supreme Being, that he received his religious training from his parents from the age of seven, that he relied on Christ Jesus and Jehovah God and the Watch Tower Bible Society for his guidance. His training and belief were all religious and in no way based on the proscribed bases, or any of them. He gave names and addresses of references and gave other supporting information.

When the local board initially classified him in Class I-A there was nothing in the file to contradict his *prima facie* case in any manner or degree whatsoever.

After he perfected an administrative appeal, the resume in the file of the FBI informants' statements, presented divided opinions, as follows: Although none attacked his veracity, and his character received commendation (even from those who expressed opinions against him) some of these faceless people doubted the

sincerity of his objections to war. Since the factual bases for their doubts are given, they can and should be examined for relevancy and materially. In no instance was any of the "facts" relevant to the stated conclusion that is, relevant by the current standards of this Court and of the Supreme Court. These cases are cited in the argument. Therefore, there was no basis in fact for the I-A classification.

POINT III.

THE LAW DOES NOT PERMIT CLASSIFICATIONS BASED ON THE STANDARDS USED FOR THIS APPELLANT.

The record reveals that the classifying and recommendatory agencies involved, used the following tests or standards in the classification process, and no other:

1) Willingness to haul "construction" material.
2) Unwillingness to aid wounded soldiers.
3) Views on force and self-defense.
4) Hunting wild game.
5) Registrant admitted he was slack in religious duties.
6) Unwillingness to accept either combatant or noncombatant duties.
7) Unwillingness to perform I-O type work.
8) Smoking and drinking.

A question was asked at the local board hearing about "fear" but there was no evidence whatever on this subject nor any finding.

It is settled in this jurisdiction that some of these tests (specified herinafter, in the argument) are not legal bases for denying a conscientious objector classification; it is contended *all* these tests *as applied,* should be outlawed.

In any event the classifying process is a chain; when an illegal standard enters into the classifying process, either by way of a Department of Justice recommendation (see Ex 29-31), or by way of a board-made summary of its classifying deliberations (see Ex 54), the entire chain is broken unless *possibly,* it is clear that no reliance was placed on the illegal standard by the classifying agency. The record here indicates that these illegal tests, *and no others,* were relied on, to appellant's prejudice.

The *only* limitation Congress placed in the Act on the definition of conscientious objector, was that the beliefs and training be religious and that they not be essentially political, sociological, philosophical, or be a merely personal moral code. Neither the Selective Service System nor the Department of Justice may add limitations.

Since illegal tests and limitations were used the conviction should be reversed.

ARGUMENT

POINT I.

APPELLANT WAS NOT REQUIRED TO REPETITIVELY APPEAL THE I-A CLASSIFICATIONS, THERE BEING NO RELEVANT NEW EVIDENCE, AND THEREFORE HE IS ENTITLED TO HAVE HIS DEFENSES CONSIDERED.

Appellant does not intend to argue the entire question of necessity of exhaustion of administrative remedies. He need not assume such a burden. Although the decisions are divided,[4] this Court has made its position clear on the general proposition. Involved here, however, is an exceptional situation, and one where this Court's rulings do not necessarily require a rejection of this appellant's argument. Appellant exhausted his remedy for relief from classification in Class I-A once; he argues that he need not do so repetitiously, absent new probative facts.

A. Exhaustion Doctrine Not Inflexible.

The chief purpose of the doctrine of exhaustion of administrative remedy is to relieve the courts of a burden better borne by specialists in the various administrative agencies.

The doctrine was not formulated to deprive young men, unassisted by counsel, of their day in court; cf. *Cox vs. Wedemeyer,* 192 F. 2d 920, where this Court

[4]"The Courts of Appeal and district courts have been divided as to whether exhaustion of all administrative remedies must be shown in these selective service cases [citing cases]" *United States vs. Palmer,* 3d Cir., 223 F. 2d 893, 901.

pointed out that, " . . . the procedure established . . . was designed to fit the needs of registrants unskilled in legal procedure . . . and none of them represented by counsel." [922-923].

The doctrine of exhaustion of administrative remedies should not be considered inflexible. Many special circumstances should excuse the registrant. This general proposition was very recently restated in *United States vs. Harvey,* 131 F. Supp. 493:

> " . . . the rule that administrative relief must be exhausted before resorting to the courts did not originate in the constitution, or any statute, but came into being simply as a point of judicial policy adopted by the courts, and the courts do not recognize that it must always be applied in hidebound fashion. The rule will be passed by, if there is good reason for making an exception, and that has been done by both the federal and state courts." [496].

So, in *U. S. ex rel. Filomio vs. Powell,* 38 F. Supp. 183, on page 187, the Court observed:

> "Evidence is conflicting as to whether Filomio demanded the questionnaire in order that he might perfect his appeal. We do not feel that it was readily available, and hence his omission in this respect was beyond his control."

In *United States ex rel. Beye vs. Downer,* 143 F. 2d 125, the Court concluded that it was the local board's fault that Beye had been deprived of an appeal. In *United States vs. Giessel,* 129 F. Supp. 223, a similar conclusion was reached.

Even where the selective service agency is without fault, [appellant does not, however, concede that it was right for the local board to reaffirm his classification repetitiously, by *a formal reclassification,* and thus face him with the problem he has encountered] in a case like Evans' *when an appeal is useless,* the registrant should be permitted to present his facts in court. This is the holding in an old draft case, *Ex parte Cohen,* 254 Fed. 711:

> "He ought not to be denied his rights to habeas corpus, where his personal liberty and nationality are involved because of his failure to do a vain thing." [p. 713).

Certainly where jurisdictional grounds are urged, the registrant should be permitted to present his case in court. The three-judge-minority opinion in *United States vs. Palmer,* supra, emphasized a point included in one that appellant Evans is pressing: A classification without basis in fact is beyond the jurisdiction of the local board and a defense based on such lack of jurisdiction is permitted by *Estep vs. United States,* 327 U.S. 114. The Second Circuit, also, has expressed grave doubts that a registrant could be denied the opoprtunity to present his facts in court, " . . . where, on undisputed facts, the Board's lack of jurisdiction is manifest." *Schwartz vs. Strauss,* 206 F. 2d 767.

It was early established that the selective service administrative process is a continuous one, beginning with registration and ending at the induction ceremony. *Falbo vs. United States,* 320 U.S. 549; *Estep,* supra.

The administrative process is like a ladder; the registrant must go to the very end, but is there a requirement that he step on every rung? No. For example, who would contend a selective service defendant is not entitled to present his defenses if he did everything except ask for a Personal Appearance Hearing? Yet the Personal Appearance Hearing is a most important rung in the ladder, for it is the only opportunity the board ever has to look the registrant in the eye and hear his views for deferment. Similarly, must he step on some rungs twice, or more? Appellant believes once is all that is required and that there is less reason to ask him to step on some rungs repetitiously than there is to ask him to not miss any rungs.

The Supreme Court Selective Service cases lay down no inflexible rule of exhaustion and a mandatory rule is contrary to the general rule of exhaustion of administrative remedies requirement which has been formulated by the Supreme Court as a flexible rule.

In *Falbo,* supra, "petitioner urged that the District Court had erred in refusing to permit a trial *de novo* on the merits of his claimed exemption." The board had classified a Jehovah's witness as a conscientious objector rather than a minister. Since, at that time, the order to report to a Civilian Public Service camp was not the final step in classification (he was later physically examined and might be rejected and placed in Class IV-F), the Court viewed the order to report as "an intermediate step" and not reviewable (as intermediate orders are usually not reviewable). The

Court did not even refer to "exhaustion". It framed the issue and its ruling thus:

> "The narrow question therefore presented by this case is whether Congress has authorized judicial review of the propriety of a board's classification in a criminal prosecution for wilful violation of an order directing a registrant to report for the last step in the selective process.
>
> "We think it has not." (320 U.S. at 554).

In *Billings vs. Truesdell,* 321 U.S. 542 (1945), the issue again was *not* the rule of exhaustion of remedies. A registrant was denied a classification as a conscientious objector. He reported to the army when directed to, but refused to submit to induction. The army claimed Billings was subject to military jurisdiction. The Court held he was not. In explaining that Billings had tried to complete the selective service process as outlined in the *Falbo* case, the Court for the first time referred to "exhaustion". The Court definitely did not extensively consider the rule; it did not lay down a mandatory rule; it merely said:

> "Moreover, it should be remembered that he who reports at the induction station is following the procedure outlined in the *Falbo* case for the exhaustion of his administrative remedies. Unless he follows that procedure he may not challenge the legality of his classification in the courts. But we can hardly say that he must report to the military in order to exhaust his administrative remedies and then say that if he does so report he may be forcibly inducted against his will. That would

indeed make a trap of the *Falbo* case . . . " (321 U.S. at 558).

Again in the *Estep* case, (1946), the Supreme Court *did not decide* that a person must exhaust administrative remedies. The real issue was whether Selective Service classifications could be reviewed in criminal prosecution.

On the other hand, if the Selective Service cases be deemed to lay down a mandatory rule requiring exhaustion of administrative remedies, in all instances, then they are an anachronism in the law—for in all other fields the courts have stated the exhaustion rule as a flexible requirement:

> "It is true that the presence of constitutional questions, coupled with a sufficient showing of inadequacy of prescribed administrative relief and of threatened or impending irreparable injury flowing from delay incident to following the prescribed procedure, has been held sufficient to dispense with exhausting the administrative process before instituting judicial intervention." *Aircraft & Diesel Equipment Corp. vs. Hirsch,* 331 U.S. 752, 773, 91 L.Ed. 1796, (1947).
>
> " . . . Whether it (the Court) should have denied relief until all possible administrative remedies had been exhausted was a matter which called for the exercise of its judicial discretion." *U. S. vs. Abilene & So. Ry. Co.,* 265 U.S. 274, 282, 68 L.Ed. 1016, (1924).
>
> " . . . In construing the Act, however, we must be mindful of the 'long-established rule of judicial

administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.' *Myers vs. Bethlehem Shipbuilding Corp.,* 303 U.S. 41, 5-51. *But this rule does not automatically require that judicial review must always be denied where rehearing is authorized but not sought. This is shown by our past decisions* (citing cases) *from which we see no reason to depart.'' Levers vs. Anderson,* 326 U.S. 219, 222, 90 L.Ed. 26 (1945).

"A determinaton of administrative authority may of course be made at the behest of one so immediately and truly injured by a regulation claimed to be invalid, that his need is sufficiently compelling to justify judicial intervention even before completion of the administrative process.'' *Eccles vs. Peoples Bank,* 333 U.S. 426, 434, 92 L.Ed. 784 (1948).

Professor Kenneth Culp Davis, the recognized authority, in his book, *Administrative Law* (West Publishing Co., 1951), says this of the exhaustion rule:

"The courts usually follow what the Supreme Court calls, 'the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.' But even though the Supreme Court customarily states the rule without qualification, the courts in many cases relax the rule. To determine when the rule will be or should be applied or relaxed requires analysis not merely of holdings but also of reasons behind the holdings. . . .

> "The principal reasons for requiring exhaustion of administrative remedies relate to efficient management and orderly procedure, use of the agency's specialized understanding, adequacy of legal remedies, exclusive jurisdiction, and statutory requirements of final order" (Davis, p. 615).

(None of these reasons for requiring exhaustion exist in the present case. Under the new procedure as to physical examination, in effect at the time of Evans' processing [and currently in effect] the registrant is physically examined long before the Order to Report for Induction is issued; the order to report for induction, therefore, is "final".[5] For the appellant whose religious beliefs did not permit him to enter the armed services the procedure was not "adequate". The agency had already exercise whatever special skill it had. The board's total disregard of evidence hardly recommended it for orderliness or efficiency. And the Supreme Court in the *Estep* and in many other draft cases had shown that for ultimate review the Selective Service Act did not exclude the courts.)

Davis goes on to state the situations in which the exhaustion requirement shall not apply. The instant case falls within these exceptions:

> "When pursuing administrative remedies will cause irreparable injury, when administrative remedies are inadequate, or when the agency's action is unconstitutional or beyond its jurisdiction or

[5]At the time of the *Falbo* decision the only physical examination was at the induction station, where the selectee was ordered to report for induction. Thus, a large percentage of selectees were rejected then and there.

clearly illegal, the courts sometimes relax the requirement that administrative remedies must be exhausted before the courts will intervene." (Davis, p. 621).

Davis collects, from pp. 621 to 633 the many cases not requiring exhaustion, only a few of which can be referred to here.

B. The Cases Requiring Exhaustion are Distinguishable.

1) The Supreme Court cases requiring exhaustion: None are applicable to appellant's case.

Prof. Harrop A. Freeman, in his Brief for Appellant in *Palmer,* supra, examines the Supreme Court cases on the subject and concludes that those demanding exhaustion of administrative remedies fall within the following observations:

a) The exhaustion principle originated in equity cases refusing injunctions because the legal remedy of completing the administrative proceedings and then petitioning for judicial review was adequate. A large proportion of cases presenting the exhaustion issue are equitable cases.

See authorities in 44 Mich. L. Rev. 1035 (1946), and 303 U. S. 41, 51 note 9.

b) In some cases requiring exhaustion the legislature had given the administrative agency "exclusive jurisdiction"; there was an attempt to enjoin agency action *before any agency action had occurred* and thus to completely nullify the statute. There was *no* "order" to be reviewed.

Myers vs. Bethlehem Shipbuilding Corp., supra;

Macauley vs. Waterman S.S. Corp., 327 U.S. 540, 90 L.Ed. 839 (1946).

c) In some the agency action was preliminary and not final.

F. P. C. vs. Metropolitan Edison Co., 304 U.S. 375, 82 L.Ed. 1408 (1938).

d) In some there was only a "supposed or threatened injury".

Myers vs. Bethlehem S. Corp., supra.

(e) Many involved tax collections where payment and later recovery of the tax was thought wiser than to challenge the whole tax power (a special application of the equitable principle of adequacy of the legal remedy).

State R. R. Tax cases, 92 U.S. 575, 23 L.Ed. 663 (1875);

Poindexter vs. Greenhow, 114 U.S. 270, 29 L. Ed. 185 (1884);

Milwaukee vs. Koeffler, 116 U.S. 219, 29 L. Ed. 612 (1885);

Dalton Co. vs. State Corp. Comm., 236 U.S. 699, 59 L.Ed. 797 (1914).

All these cases were cited in the *Myers* case, yet even this group of cases recognizes as excuses for exhaustion: (1) lack of due process—*Londoner vs. Denver,* 210 U.S. 373, 52 L.Ed. 1103 (1907); (2) irreparable injury—*Poindexter vs. Greenhow,* supra; (3) inadequacy of remedy—*Dawson vs. Freiburg Co.,* 255 U.S. 288, 65 L.Ed. 638 (1920).

2) The Supreme Court cases not requiring exhaustion of administrative remedies are many and seem to fall into the following categories:

1) *Irreparable injury.*

Public Utility Comm. vs. United Fuel Gas Co., 317 U.S. 456, 87 L.Ed. 396 (1943);
Utah Fuel Co. vs. Bituminous Coal Comm., 306 U.S. 56, 83 L.Ed. 483 (1939).

2) The orders involved are "*on their face plainly invalid*" or "in disregard of law".

P. U. C. vs. United Fuel Gas Co., supra.
Recognized in: *Delaware & Hudson Co. vs. U. S.,* 266 U.S. 438, 69 L.Ed. 369 (1924).

3) *Unconstitutionality.*

Hillsborough vs. Cromwell, 326 U.S. 620, 90 L.Ed. 358 (1946).

4) Agency had *acted beyond its jurisdiction.*

Gonzales vs. Williams, 192 U.S. 1, 48 L.Ed. 317 (1904);
Skinner & Eddy Corp. vs. U. S., 249 U.S. 557, 63 L.Ed. 772 (1919);
P. U. C. vs. United Fuel Gas Co., supra;
Ill. Comm. vs. Thompson, 318 U.S. 675, 87 L.Ed. 1075 (1943).

5) *Improbability of obtaining adequate relief* in the administrative process.

Smith vs. Illinois Bell Co., 270 U.S. 587, 591, 70 L.Ed. 747 (1926);
Order Ry. Cond. vs. Swan, 329 U.S. 520, 91 L.Ed. 471 (1947);
Union Pac. Ry. vs. Board, 247 U.S. 282, 62 L.Ed. 1110 (1918);
Waite vs. Macy, 246 U.S. 606, 62 L.Ed. 892 (1918);
Montana Nat. Bk. vs. Yellowstone Co., 276 U.S. 499, 72 L.Ed. 673 (1928);
Hillsborough Tp. vs. Cromwell, 326 U.S. 620, 90 L.Ed. 358 (1946);
City Trust Co. v. Schrader, 291 U.S. 24, 78 L.Ed. 628 (1924).

6) Agency had entered final order and *only administrative reconsideration or appeal remains* (discretionary for court to take jurisdiction).

Prendergast vs. N. Y. Tel. Co., 262 U.S. 43, 48, 67 L.Ed. 853 (1923);
U. S. vs. Abilene & S. R. Co., supra;
Levers vs. Anderson, supra;
Fed. Adm. Pro. Act, sec. 10 (c).

7) Agency or government brings the court proceeding civilly or criminally and the *defendant merely defends against an invalid order.*

F. P. C. vs. Panhandle E. Pipe Line Co., 337 U.S. 498, 93 L.Ed. 1499 (1949).

Appellant will discuss the application of the cases not requiring exhaustion of administrative remedy in

the two portions of his argument headed Point II and Point III, below, wherein he presents his two defenses, one attacking the jurisdiction of the board, and the other presenting a denial of due process. However, before proceeding to his two arguments on the merits, he desires to offer some further cases and comment by way of concluding his argument on exhaustion. The attention of the Court is particularly invited to comment (4) below [Improbability of obtaining Administrative Relief Excuses Exhaustion] in the following argument:

C. Evans' Case Presents Five Exceptions to the Rule.

1) Lack of change of status is the governing fact in this case.

It has been long, firmly and nationally established that if a registrant furnishes no *new* information, it is not required of the board that it reclassify him again, although he repetitiously, directly, or impliedly, requests such reclassification action. The leading case is *United States vs. Zieber,* 3rd Cir., 161 F. 2d 90, wherein the Court said:

> "If Zieber furnished no new information this Board was not required to classify him again." [92].

By like reasoning, appellant submits, a registrant should not be required to take repetitious and vain appeals. This reasoning, appellant believes, is merely the other side of the *Zieber* coin.

This Court has already used language with the converse of this line of reasoning. Preliminarily, we find in *Kaline vs. United States,* 235 F. 2d 54:

> "It is settled that a registrant is not entitled to a judicial review of any classification from which he did not appeal [citing cases]." [62].

Appellant Evans submits that his facts bring him within the corollary of this holding: No one contends that Evans ever was in any other classification than I-A (and from which he had appealed); nor can anyone contend that his subsequent "reclassifications" in Class I-A were the result of any new evidence. Shortly after *Kaline,* supra, this Court, in [Arthur] *Clark vs. United States,* 236 F. 2d 13, approached very near to the conclusion that appellant Evans is urging. *Clark* holds:

> "A registrant is not entitled to repetitious determinations of identical issues. [Citing *Davidson vs. United States,* 9th Cir., 218 F. 2d 609]." [21].

Since repetitious appeals are not permitted, surely repetitious appeals should not be required on identical issues.

Davidson had asked for a second appeal; the local board, either through mistake, or out of an abundance of good will, again started his file on the route of the special appellate procedure provided for registrants professing conscientious objections. This Court, on pages 611-612, said:

"The record submitted to the appeal board contained *nothing new* which could affect its prior decision. An alert hearing officer first saw the mistake and advised Davidson that he was not entitled to a second hearing because he had already had one. The Department of Justice notified the appeal board that *there was no new evidence* which altered its previous recommendation that the registrant's conscientious objector claim be not sustained. We are of the view that this conclusion was correct and it was not incumbent upon the Department to grant Davidson a hearing on this second occasion of his appearing before the hearing officer." . . .

"To require appeal boards and the Department of Justice to consider and reconsider cases of this nature at the whim of the registrants would unnecessarily tend to confuse the appellate procedures and would be violative of the system set forth with preciseness in section 6(j)." [Emphasis supplied.]

Appellant submits it would tend to confuse the appellate procedure, unnecessarily burden the appellate machinery, and be unfair to registrants (none of whom are legally trained to appeal every 'final order') to require them to repetitiously perfect an appeal whenever repetitiously given the very same classification, no new evidence or different classification intervening.

Appellant Evans' case is readily distinguishable from any of this Court's decisions on the subject of exhaustion of administrative remedies and also from the only *en banc* decision on the subject, *Palmer vs.*

United States, supra. There, by a four to three decision, the registrant's conviction was affirmed, but the majority took pains to point out that Palmer had ignored the *entire* remedial process [897]. Palmer was a "non-registrant" and had never appealed *anything.* Appellant Evans undisputedly pursued his remedial process from classification in Class I-A, the only class he was ever in.

This Court's several "exhaustion" cases are distinguishable in that either no appeal at all was ever taken, or a new status entered the file, one requiring an appeal.

2) Lack of jurisdiction excuses failure to exhaust remedies.

In *Gonzales vs. United States,* 192 U.S. 1, habeas corpus was brought by a Puerto Rican woman who was held in custody after the Immigration Commissioner had determined she was an "alien immigrant" subject to exclusion. Appeals to the Superintendent of Immigration and to the Secretary of Treasury were authorized by statute. Said the Court, p. 15:

> " . . . the commissioner had no jurisdiction to detain and deport her (for she was not an alien immigrant) . . . and *she was not obliged to resort to the Superintendent or the Secretary.*"

The very nature of this defense makes inapplicable the supposed *Falbo* rule of exhaustion.

In *Varney vs. Warehime,* 147 F. 2d 238, 243, cert. den. 325 U.S. 882 (1945), the Court said that the ex-

haustion requirement "is not an iron-clad rule and it has no application where the defect urged goes to the jurisdiction of the agency."

This is recognized in the immigration cases cited by the Supreme Court in the *Estep* case, supra, and seems to be accepted in that case when the Court speaks of a Pennsylvania Board ordering a citizen of Oregon to report for induction and "the defense that it had acted beyond its jurisdiction could be interposed in a prosecution under Sec. 11."

3) Lack of due process and clear error of law excuse failure to exhaust remedies.

Elsewhere we refer to the lack of due process and errors of law as independent defenses—and the Supreme Court has recognized this as a Selective Service defense in the *Estep* case—but the same lack of due process and the same clear errors of law also excuse non-exhaustion of administrative remedies (as pointed out in the authorities cited above).

Lack of due process is referred to as excusing the exhaustion of remedies by Judge Frank in the Selective Service case of *Schwartz vs. Strauss,* supra.

It is the basis of cases like *Skinner Corp. vs. United States,* supra, and the *United Fuel Gas* case, supra, which relieved a party of the necessity of exhausting administrative remedies.

It seems to be recognized in the *Estep* case is discussing an attempt to induct a congressman or to

classify a person as available for induction because he is a Negro, Jew or German, of which the Court says:

> "In all such cases its action would be lawless and beyond its jurisdiction."

It is the holding in *United States vs. Donovan,* 178 F. 2d 876 (C.A. 7th, 1949), a parole case excusing exhaustion where lack of due process is shown.

It was on the theory of an allegation of lack of due process in military segregation that a Negro was allowed by the Eastern District of Pennsylvania to challenge a I-A classification without exhausting his administrative remedies in *United States vs. Tomlinson,* 94 F. Supp. 854 (1953).

It was the basis of the decision of the same court in hearing a veteran's preference case even without exhaustion of administrative remedies:

> "Where a statute, which commands an official of the government to perform, or prohibits him from performing an act in a particular situation is so clear as to be free from doubt as to what it prescribes, a court will enjoin a violation of the Act *even though the victim has not pursued his administrative remedies." Brainer vs. Wallin,* 79 F. Supp. 506, 508 (1951).

In *Wettre vs. Hague,* 74 F. Supp. 396, a district court refused an injunction in a veteran's preference case because there had been no exhaustion of administrative remedies. Then the Supreme Court in *Sullivan vs. Hilton,* 334 U.S. 323, decided the substantive rule

contrary to that applied by the Civil Service Commission; so the Court of Appeals in *Wettre vs. Hague,* 168 F. 2d 825 (C.A. 1st, 1948), held that since the administrative action was a clear error of law, "there is no longer any occasion for the requirement that they exhaust whatever administrative remedies they may have."

In *ex parte Fabiani,* 105 F. Supp. 139 (1952), E.D. Penna., a medical student in Italy was allowed to defend against a I-A classification though he had not exhausted his administrative remedies. (He not only had not appealed, but he had not reported for physical examination or for induction.) The Court cited case after case where lack of due process and clear error of law were defenses to prosecution for selective service violations and concluded that exhaustion was excused under these cases.

In addition to the numerous cases cited in the *Fabiani* case, in which lack of due process and clear errors of law resulted in declaring classifications invalid and preventing convictions for their violation, many could be added because there are 125 reported selective service cases since Korea, wherein one or more reasons have been given for a judgment of acquittal, or for reversal of a judgment of conviction.

4) Improbability of obtaining administrative relief excuses exhaustion.

This is one of the grounds for excusing exhaustion which all the authorities recognize. It was the ground for refusing to require exhaustion of remedies in *Smith vs. Illinois Bell Co.,* 270 U.S. 587, 70 L.Ed. 747 (1926), where the administrative agency had shown by past conduct it would not act. So also, in *Order of Railway Conductors vs. Swan,* 329 U.S. 520, 91 L.Ed. 471 (1947), the Supreme Court intervened in advance of administrative action (expressly distinguishing the *Myers* case, supra, requiring exhaustion) to relieve a stalemate within the board by which the first and fourth divisions disagreed as to who had jurisdiction, saying:

> "We are dealing with a jurisdictional frustration on an administrative level, making impossible the issuance of administrative orders which Congress explicitly has opened to review by the courts."

In *City Bank Farmers' Trust Co. vs. Schnader,* 291 U.S. 24, 78 L.Ed. 628 (1934), the Supreme Court did not require exhaustion where it was certain from previous action that the administrative officers would give an adverse decision. Many other Supreme Court cases are referred to above, and collected in Davis, *Administrative Law,* pp. 625-628.

In *ex parte Cohen,* supra, the inductee was excused, the Court concluding that the administrative appeal would have been "a vain thing." [p. 713].

The Courts constantly recognize this exception to the exhaustion rule and apply it as in the recent case of *Fidalgo Island Packing Co. vs. Phillipa,* 120 F. Supp. 777 (D.C. Alaska, 1954), where the defendant was excused from exhausting his administrative remedies where the Commission was deadlocked in a tie vote on all major issues; to have appealed to the commission would have gained no result.

In the instant case, the board had already formally disregarded all the undisputed evidence in Evans' file; the appeal board had already formally rejected his claim; *he had no new evidence to present.* It would have been useless to have again asked the Selective Service System to go through the same procedure on the same facts.

Finally [on this sub-point]: Evans had obviously learned from his contacts with them that the classifying agencies were using irrelevant standards to deny him a classification called for by his evidence; as will be shown hereinafter, most of these standards are already outlawed by appellate decision and the balance are, to say the least, suspect. Therefore, to apply an apt expression used by the First Circuit in *Steele vs. United States,* ..... F. 2d ....., decided December 21, 1956, slip opinion page 7 Evans had reason to regard the boards as "less than expert and possibly hostile."

5) Appeal not possible.

The Director of Selective Service promulgates a number of departmental regulations and directions. These are variously termed: Operations Bulletins, Local Board Memoranda, etc. It is doubtful if they have the full force of law, none being published in the Federal Register and, with the exception of the LBMs, wholly unavailable to registrants; nevertheless, the following is submitted for the Court's consideration.

It is to be observed that when the board called in its registrant for an interview on June 14, 1955, it stated it was acting "In conformity with Selective Service Local Board Memorandum No. 52, Paragraph 3(a) . . . " [Ex 46].

Local Board Memorandum No. 52 reads:

> "3. WHEN PERSONAL APPEARANCE IS NOT A PROCEDURAL RIGHT.—(a) A registrant is not entitled to a personal appearance as a procedural right unless he makes a request therefor after he has been classified by the local board and within 10 days after the Notice of Classification (SSS Form No. 110) has been mailed to him. However, the local board may in its discretion permit a registrant to appear in person pursuant to his request made at any other time or the local board may, upon its own initiative, direct a registrant to appear before it. In both such instances the appearance of the registrant before the local board does not constitute a personal appearance under section 1624.1 of the regulations, *and no right of appeal to the appeal board*

accrues to the registrant solely because of any such appearance.''
[Issued: January 14, 1953 and unchanged to date of this Opening Brief. Emphasis supplied.]

In summary: It is apparent that the rule requiring exhaustion of administrative remedies is not inflexible. Appellant believes the facts entitle his predicament to be considered an exception to the exhaustion rule, and that his defenses (argued hereinafter) should be considered, and that they are sufficiently meritorious to have required a judgment of acquittal.

POINT II.

THE DENIAL OF THE CONSCIENTIOUS OBJECTOR STATUS WAS WITHOUT BASIS IN FACT

Section 6(j) of the act (50 U.S.C. App. § 456(j), 65 Stat. 75, 83, 86) provides:

> ''Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief, in this connection, means an individual's belief in a relation to a Supreme Being, involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.''

Section 1622.14 of the Selective Service Regulations (32 C.F.R. § 1622.14) provides:

> "Class I-O: *Conscientious objector available for civilian work contributing to the maintenance of the national health, safety, or interest.*
> —(a) In Class I-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces."

Section 1622.11 provides:

> "Class I-A-O: *Cconscientious Objector Available for Noncombatant Military Service Only.*—(a) In Class I-A-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to combatant training and service in the armed forces."

The attitude of the Selective Service System and of the court below, concerning whether there was a basis in fact for the classification was grounded upon error. To begin with, it ignores the doctrine of *Dickinson vs. United States,* 346 U.S. 389 (1953). That decision requires that the board, ". . . must find and record affirmative evidence that he has misrepresented his case . . . " —346 U.S., pp. 396-397, 399 (dissenting opinion). And it also ignores the doctrine of *Witmer*

vs. United States, 75 S.Ct. 392 (1955) wherein the yardstick of sincerity is made the law. Absent any finding recorded that questions it, the *Dickinson* doctrine controls.

Congress says that a man is a conscientious objector if he (1) believes in a Supreme Being, (2) conscientiously opposes participation in the armed forces by combatant or noncombatant service, and (3) bases such objection on religious training and belief. The appellant concededly believed in a Supreme Being. He opposed participation in the armed forces. He based those objections on his religious training and belief.

The evidence submitted by the appellant established at least *prima facie*[6] that he had sincere and deep-seated conscientious objections against participation in combatant and also noncombatant military service and that these objections were based on his "relation to a Supreme Being involving duties superior to those arising from any human relation." This material also showed that his belief was not in the least based on "political, sociological, or philosophical views, or a merely personal moral code"; that it was entirely based upon his religious training and belief as one of Jehovah's witnesses. The subsequent fact that his secular work became such that he could not devote the usual time required of a "witness" (and to continue to be

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[6]The language of *Dickinson* is:

"But when the uncontroverted evidence supporting a registrant's claim places him *prima facie* within the statutory exemption, dismissal of the claim solely on the basis of suspicion and speculation is both contrary to the spirit of the Act and foreign to our concepts of justice.

"Reversed." [74 S. Ct. 152, 158].

considered a minister by his brethren) does not detract from the beliefs he held. After his secular work changed he was presented with a new questionnaire by the local board. In answering it he specifically pointed out that his current inactivity in witness missionary work had no relation whatever to his conscientious objections to participation in war. The questionnaire asked concerning church membership. He explained his answer of "no" by stating: "To be a member you have to be active," and "I haven't been active in the preaching work or attending Bible Studies Regular, *but that doesn't change the way I believe.*" (emphasis supplied).

The Selective Service System raised no question [none is recorded] concerning the *veracity* of the petitioner. The question therefore is not one of fact, but is one of law; *Dickinson vs. United States*, supra. The law and the facts in his file, at least *prima facie,* establish that petitioner is a conscientious objector opposed to combatant and noncombatant service.

It is to be noted that even the hearsay evidence of the FBI investigative report did not question his veracity. There are two documents on this portion of the evidence: The Department of Justice recommendation to the Appeal Board, and the resume of the FBI investigative report. The former [Ex 29-31] mentioned only irrelevant facts[7]: appellant's inactivity in witness work; that he occasionally had smoked and drank; that he believed in self-defense; the Hearing Officer's conclusions (with no *relevant* evidence or reasons given to

[7]The "irrelevancies" are argued in more detail in Point III, below.

support them) that appellant was not religious and that his claim was not made in good faith. The conclusions of several informants (but not all, by any means) that he was not sincere in his conscientious objections, were in all instances based on irrelevant standards; none was based on a question of his veracity. Conclusions must be supported by relevant evidence; *Blevins vs. United States,* 9th Cir. 217 F. 2d 506, 508. Also, as was said in *United States vs. Close*, 7th Cir. 215 F. 2d 439: "But the reasons for the opinions expressed in the interviews were not shown." [441]

The resume contained many statements that he was of good character and reputation, trustworthy and dependable [Ex 31]. The "adverse" evidence was that he was not considered "particularly religious," that he was heard to use profane language when he became angry [Ex 31]; that he had a "hopped-up hot rod," and "that the registrant never displayed any interest in **church** work or church activities, and he does not understand how the registrant can file his conscientious objector claim in view of this and he, therefore, does not believe the registrant should be a conscientious objector." [Ex 32].

Nevertheless, neither this above-quoted informant, nor any of the others who gave the FBI "adverse" facts, questioned Evans' veracity.

On the other hand, if it be considered that the above two documents contained relevant, adverse facts, then the doctrine of *Gonzales vs. United States*, 75 S.Ct. 409, comes into play and it alone requires reversal. As was

said in *United States vs. Cooper*, 3d Cir., 223 F.2d 448: "What Gonzales was entitled to, Cooper was entitled to." [448]. Until the *Gonzales* decision, as stated therein, nothing in the law (neither the Act, nor the Selective Service Regulations, nor the Department of Justice regulations) required that a copy of the Department's recommendation to the Appeal Board be sent to the registrant and in sufficient time for him to rebut any adverse conclusions or evidence therein, or at all. The fact is that the registrant was never sent copies of the recommendation until *after Gonzales*, supra. See Appendix "A." *Gonzales* was decided March 14, 1955; Evans' Appeal Board received the Department's recommendation on August 2, 1954 [Ex 29]. The procedure, having been found wanting, a number of pending cases have been reversed, as in *Cooper*, supra.[8] Since the recommendation in Evans' case was never given him, and was adverse to his claim, and resulted in an adverse decision on his appeal, it is submitted that for this alone, the judgment should be reversed.

In view of the fact that there is no contradictory relevant evidence in the file, disputing appellant's statements as to his conscientious objections, and there is no question of veracity presented, the problem to be determined here by this Court, appellant repeats, is one of

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[8]Other reversals, relying on *Gonzales*:
Duron vs. United States, 9th Cir., 221 F. 2d 187;
Bradley vs. United States, (from Ninth Circuit), 75 S. Ct. 532;
Arndt vs. United States, 222 F. 2d 484, 488.
Reversals using *Gonzales*, among other reasons:
United States vs. Mango, 7th Cir., 221 F. 2d 479;
In *Nelson vs. United States*, 221 F. 2d 623, the Seventh Circuit worried over the fact that Nelson hadn't asked for a summary but concluded that the language in *Gonzales* precluded the application of waiver. [625-6].

law rather than one of fact. The question to be determined is: Was the decision (that the evidence did not prove appellant was a conscientious objector opposed to both [or either] combatant and noncombatant military service) arbitrary, capricious and without basis in fact?

The undisputed documentary evidence in the file showed that the appellant was conscientiously opposed to participation in combatant and noncombatant military service. This showing brought him squarely within the statute and the regulation providing for classification as a conscientious objector. This entitled him to exemption from combatant and noncombatant military training and service.

There is absolutely no evidence whatever in the draft board file that appellant was willing to do military service. All of his papers, and every document supplied by him, staunchly presented the contention that he was conscientiously opposed to participation in both combatant and noncombatant military service. Never, at any time, did the appellant suggest to the Selective Service System, or even imply, that he was willing to perform any military service. He, at all times, contended that he was unwilling to go into the armed forces and do anything as a part of the military machinery.

It has been held by many courts of appeal that the rule laid down in *Dickinson vs. United States*, supra, (holding that if there is no contradiction of the docu-

mentary evidence showing exemption as a minister, there is no basis in fact for the classification) also applies in cases involving other claims.

Weaver vs. United States, 8th Cir., 1954, 210 F.2d 815, 822-823;

Taffs vs. United States, 8th Cir., 1953, 208 F.2d 839, 331-332;

United States vs. Hartman, 2d Cir., 1954, 209 F.2d 366, 368, 369-370;

Pine vs. United States, 4th Cir., 1954, 212 F.2d 93, 96;

Jewell vs. United States, 6th Cir., 1953, 208 F.2d 770, 771-772;

Schuman vs. United States, 9th Cir., 1953, 208 F.2d 801, 802, 804-05;

Jessen vs. United States, 10th Cir., 1954, 212 F.2d 897, 900;

United States vs. Close, 7th Cir., 1954, supra;

United States vs. Wilson, 7th Cir., 1954, 215 F.2d 443, 446;

contra United States vs. Simmons, 7th Cir., 1954, 213 F.2d 901.

Simmons was reversed by the Supreme Court on March 14, 1955, *Simmons vs. United States*, 75 S.Ct. 397. The reversal was on other grounds, however and it remained for *Witmer*, 75 S.Ct. 392, to settle the point. In *Witmer*, it was held that the inconsistent statements and positions of the registrant, gave the Selective Service System a basis in fact for disbelieving his

sincerity and denying his claim for a conscientious objector classification. The Court referred to the Department of Justice findings that Witmer had retreated from one deferred claim to another (for a total of three claimed statuses) and had made inconsistent statements, and had offered to contribute to the war effort [395].

Appellant Evans' file cannot be fairly charged with containing any of the above flaws. He was entitled to at least a I-A-O conscientious objector classification. That he might have turned it down, was no excuse for not giving it to him. See *Franks vs. United States*, 9th Cir., 216 F.2d 266, 269.

In *Jessen vs. United States*, 10th Cir., 1954, supra, 900, after quoting from *Dickinson*, supra, the Court said:

> "Here, the uncontroverted evidence supported the registrant's claim that he was opposed to participation in war in any form. There was a complete absence of any impeaching or contradictory evidence. It follows that the classification made by the State Appeal Board was a nullity and that Jessen violated no law in refusing to submit to induction."

In our search of appellant Evans' file for possible impeaching or contradictory evidence, let us again revert to the *Witmer* yardstick. Witmer claimed he was a minister *after* he was denied an agricultural deferment [396]. Evans, after his conscientious objector

claim was rejected, specifically pointed out that he was not a minister, or even a sect "member," by frankly spelling out the sect's standard: "You must work at it." At every turn, Evans frankly set forth the facts but staunchly maintained, "but that doesn't change the way I believe." [Ex 48]. What more can a conscientious objector do? Ministers do public acts; so do farm workers, students. A conscientious objector *believes*, and governs his professions and conduct accordingly. The relevant evidence is all on *one* side, Evans'. His veracity was never questioned.

There must be an affirmative finding that his evidence lacked credibility. "It is hard to see how the board could have refused a deferment under the case of *Dickinson vs. United States*, 346 U.S. 389, unless there was an affirmative finding that the evidence lacked credibility." *United States vs. Williams*, No. 8917 Criminal, D. Conn., April 2, 1954, Judge J. Joseph Smith. And see *United States vs. Peebles*, 7th Cir., 220 F.2d 114, 119, and cases cited. Also *Weaver vs. United States*, supra, *Jewell vs. United States*, supra, *Hagaman vs. United States*, 3d Cir., 213 F.2d 86, *United States vs. Izumihara*, D. Hawaii, 120 F.Supp. 36, *United States vs. Close*, 7th Cir., supra.

This phase of Evans' case is similar to two cases decided by this Court in 1954. In *Shepherd vs. United States*, 9th Cir., 217 F.2d 942, we read:

> "However, this case differs in an important particular from the Hinkle case where we pointed

> out that there was no suggestion of any sham or fakery on the part of Hinkle whose beliefs and views were admittedly sincere and genuine. Here it is to be noted the Department's recommendation of a denial of exemption was based upon a disbelief in Shepherd's honesty and sincerity as well as upon the legal conclusions that he could not be a conscientious objector because of his belief in self defense and in theocratic war." [945]

Substitute the particular artificial tests used to judge Evans [see Point III, hereinafter] for "self-defense" and "theocratic war" and the situations are identical.

Even where it could be said the appeal board might have found against an appellant on a legal basis the presence of the illegal ones in the advice of the Department compels the conclusion the classification is tainted. See *Batelaan vs. United States*, 9th Cir., 217 F.2d 946, 947-8. Nor does the doctrine of official regularity aid the appeal board classification: see *Shepherd*, supra, page 946, *because these are criminal cases.*

The boards should be told they must record more of their classification facts and bases. At least one district judge has spelled this out. In *United States vs. Christensen*, S.D. Calif. No. 23,220, Judge Westover, on December 28, 1953, said:

> "This court has heretofore held that each classification is a new and separate classification: that neither the appeal board nor the Presidential

Board affirms or denies a classification made by the local board, but that each is a new classification and makes moot all former classifications (*United States vs. Lynch*, 115 F.Supp. 735). We have also held that an appeal presents each and every issue to the appeal board (*U.S.A. vs. Oakes*, #23,188, November 30, 1953). Consequently, in the case at bar the state appeal board and the Presidential Appeal Board had before them the claim that registrant was entitled to a ministerial classification. If the appeal board or the Presidential Appeal Board considered registrant's claim that he was entitled to a minister classification, there is no indication of such consideration in the selective service file. If the appeal board and the Presidential Appeal Board did not consider registrant's claim that he was a minister, then the classification of the appeal board and of the Presidential Appeal Board were arbitrary classifications. If they did consider registrant's claim, then some record should have been made of that fact."

POINT III.

THE LAW DOES NOT PERMIT DENIALS OF CLASSIFICATIONS TO BE BASED ON THE TESTS APPLIED TO THIS APPELLANT.

Congress provided that registrants, professing to be conscientious objectors to participation in warfare, be exempted from military service; Section 6(j) of the Act, supra. The tests to be applied are set forth in said section.

The tests applied by the Selective Service System were ones not set forth in the law. They were arbitrary and artificial. The Selective Service System is to classify, not to penalize. The tests actually used are found on page 54 of the Exhibit, the selective service file. The tests were:

1) His willingness to haul "construction" material;
2) His expressed unwillingness to aid wounded soldiers;
3) His views on self-defense;
4) His ownership of a hunting rifle, his activity as a hunter and his unwillingness to use the rifle in warfare.

At the hearing he was also asked if fear was his motive. This is a proper test, and where some evidence exists, could be a legitimate basis for disallowing a conscientious objector claim; however, the board's summary of the dialogue does not in the least indicate that his answer or his demeanor on this test was con-

sidered to be damaging to his claim. We cannot speculate that the board *might* have questioned the appellant's veracity on this test and might have concluded from this that his claim was insincere or based on cowardice. Even so the mere asking of a question is not evidence. In addition there must be an affirmative finding and a recordation, as was shown hereinabove under Point II, citing *Dickinson, Williams, Peebles, Weaver, Jewell, Hagaman, Izumahara,* and *Close.* The language of Mr. Justice Jackson in *Dickinson* is "The board must find and record affirmative evidence . . . in short, the board must build a record." [159].

No legitimate standard was actually applied. "If anything which occurred at that interview, including Ashauer's demeanor or the manner in which he conducted himself, was inconsistent with or derogative of his avowal of conscientious objection, there is no hint of it in the board's memorandum regarding the interview." This quotation is from *Ashauer vs. United States,* 9th Cir., 217 F. 2d 788, 791.

The Department of Justice recommendation to the appeal board is found on pages 29-31 of the Exhibit. It reveals that these same four tests were used with four additional ones, namely, that the appellant

5) Admitted he had been slack in the duties of his ministry (Ex 30). This was a particularly irrelevant test, for the Department of Justice is not concerned with the IV-D, ministerial

classification, but only with the I-O and I-A-O conscientious objector's classifications.

6) Unwillingness to accept either combatant or noncombatant duties.

7) Unwillingness to perform I-O type work.

8) Smoking and drinking.

These tests will be considered *seriatim.*

It is appellant's position that none of the standards used in classifying him or tests used in denying his claimed classifications were legitimate. Some doubtless need little or no argument. Appellant will try not to belabor those particular ones in his Opening Brief.

1) His willingness to haul "construction" material:

First, Congress did not tend to allow an inquest to be held as to the kind of work that a registrant did or was willing to do. Congress intended to protect every person who has conscientious objections, based upon religious grounds, to participation in war in any form. Congress did not make the factors relied upon any basis in fact for the denial of the conscientious objector claim.

United States vs. Wilson, 7th Cir., 1954, supra, 446;

Franks vs. United States, 9th Cir., supra;

Hinkle vs. United States, 9th Cir., 216 F. 2d 8;

Goetz vs. United States, 9th Cir., 216 F. 2d 270.

The standards used below are based on an unreasonable interpretation of Section 6(j) of the Act, extended to forfeit the status if the objector is willing to engage in "indirect participation." The proper interpretation of the Act should limit consideration to participation in military service with the word "direct". If consideration of work that the objector is willing to do is not limited to direct participation, but extends to indirect participation, then the conscientious objector can be denied his status unless he refuses to do anything in any way indirectly contributing to the war effort. In time of total war every civilian is indirectly geared to, and participates in the war effort whether he likes it or not. The construction placed upon the Act by the classifying authorities completely nullifies the provisions of the Act that conscientious objectors do civilian work contributing to the war effort. Congress did not intend to be so unfair or unreasonable.

The classifying authorities' attitude is subversive of the intention of Congress. It ignores completely the criterion of opposition to participation in the armed forces. It injects the vague and indefinite dragnet of parochial notions into the statute, nullifying completely the plain purpose of Congress in passing the law.

Congress was dealing only with raising an army. Exemption from becoming a soldier was given to many different classes of registrants who contributed to the war effort. The performance of a certain type of work outside the army deferred most of the ones ex-

cused from training and service. Pursuit of the vocation of minister is an outstanding exemption. Farming, essential work in the national defense industry, and service to the state or federal governments in different capacities are the most common exemptions. The status of severe hardship and conscientious objection are other deferments and are not based on occupation or work.

Deferment based on hardship or conscientious objection does not at all depend on the type of work that the registrant is willing to perform. The statute nowhere makes the kind of work done by a registrant, claiming deferment as a conscientious objector before induction, an element to consider. The only time that the type of work performed, or willing to be performed by a conscientious objector, is material (and then it is after induction, and not work before induction that is involved) is when it is shown that he performs combatant service or is willing to perform combatant service. Then and only then can it be said that the service performed, or willing to be performed by the registrant, disproves conscientious objection to service.

Congress did classify the type of work that a conscientious objector can be drafted to do. It is anything that contributes to the health, safety and welfare of the nation. So long as it is of a civilian nature, it must be done when ordered by the draft board. What is there in the Act or the Regulations to prevent a draft board from ordering a conscientious objector to do work in a war plant? Nothing! Concerning the

similar provision for work by conscientious objectors under the 1940 Act, it is said, " . . . that the Act did not even guarantee that the objector would not be assigned to do work connected with the war effort." (Sibley and Jacob, Conscription of Conscience, Cornell University Press, Ithaca, New York, 1950, p. 50). Since a conscientious objector could be ordered to do work of a civilian nature, contributing to the national welfare in a defense plant, then how can the government now say that because a man says he is willing to haul "construction" material, he is not a conscientious objector? Such an argument is incongruous and leads to unreasonable and harsh results. Nevertheless, since this Court has indicated that certain occupations are so close to warfare that they may be used in determining the sincerity of the registrant, appellant must comment on this matter. Hauling "construction" material is not the equivalent of manufacturing munitions of war, the criterion used by this Court in *White vs. United States,* 215 F. 2d 782, 786. Evans' work was far removed from the kind of work that could fairly be considered inconsistent with his professions of conscience. White apparently was engaged in the manufacture of munitions. (pages 785-786). This Court, in its denial of the government's Petition for Rehearing in [Roger] *Clark vs. United States,* 217 F. 2d 511, said:

> "We find no resemblance between this case and the *Witmer* case. The *Witmer* case, like our cases of *White vs. United States,* 215 F. 2d 782, and *Tomlinson vs. United States,* 216 F. 2d 12, was one *in which it was clear* that the registrant had

been denied a conscientious objector classification upon the simple determination that he was not sincere. The facts relating to Clark are very different. The record here discloses not only that there was *no determination of insincerity* on the part of Clark but the action of the appeal board *followed* the receipt of erroneous advice from the Department of Justice that in view of registrant's willingness to use force in self defense, defense of family and fellow church members, and concerning his employment by an establishment which served persons engaged in furthering the military effort, he could not be classified as a conscientious objector." [Emphasis supplied.]

Nowhere does the law authorize the Selective Service System and the Department of Justice to invent fictitious and foreign standards and use them to speculate against evidence and facts that are undisputed.

Sicurella vs. United States, 75 S. Ct. 403;
Annett vs. United States, 10th Cir., 1953, 205 F. 2d 689;
Hinkle vs. United States, 9th Cir., supra;
Clementino vs. United States, 9th Cir., 216 F. 2d 10;
United States vs. Alvies, N.D. Cal. S.D., 1953, 112 F. Supp. 618, 260, 623-624;
United States vs. Graham, W.D. Ky., 1952, 109 F. Supp. 377, 378;
United States vs. Everngam, D. W.Va., 1951, 102 F. Supp. 128, 130-131;
Dickinson vs. United States, supra;

United States vs. Hartman, 2d Cir., 1954, supra, 369, 371;
Schuman vs. United States, 9th Cir., 1953, supra, 802, 805;
Weaver vs. United States, 8th Cir., 1954, supra, 823;
Lowe vs. United States, 8th Cir., 1954, 210 F. 2d 823;
United States vs. Lowman, W.D. N.Y., 1954, 117 F. Supp. 595, 598;
United States vs. Benzing, W.D. N.Y., 1954, 117 F. Supp. 598.

The classifying authorities, in defiance of the intent of Congress by a strange and unreasonable interpretation of the Act, now would force all conscientious objectors to go on a sit-down strike and do absolutely nothing, either directly or indirectly, that might conceivably contribute to the war effort, in order to preserve the freedom from participation in the armed forces granted to them by Congress.

2) His expressed unwillingness to aid wounded soldiers is an irrelevant fact.

If anything, this attitude is but a carrying to its logical conclusion his "I-O" position. A I-A-O type conscientious objector is one who has a religious antipathy to personally killing human beings in warfare but not to participating in military activity that merely aids others to do so. The I-O type has a "complete" antipathy to military activity and therefore cannot

conscientiously put back on the firing line a man trained to kill.

This point hardly needs any argument. Whatever dislike one may have for the objector purist who says he would not aid a wounded soldier, it is required that we adopt, at least, the judicial detachment expressed by Judge Picard in *United States vs. Kobil,* No. 32390, E.D. Mich., September 13, 1951:

> "That is wrong; absolutely wrong and un-American. The boards might as well find it out now as at any time.
>
> "Now, the fact that this man won't salute the flag makes my blood boil; and that he won't fight for his country also makes my blood boil. But that hasn't anything to do with this, with you and me. I am the Judge; I have got to follow the law as it is in making a decision—not my natural tendencies, because he probably would have been in jail long ago if I had been permitted to follow my natural tendencies. That isn't it.
>
> "I want to look at this from the angle that I believe I should as a Judge."

Nor can it be argued that appellant, by expressing unwillingness to aid wounded soldiers was waiving a I-A-O classification and thus nullifying the argument he makes here that his evidence showed he was entitled to at least such a classification. This Court has flatly stated that this is not a waiver and that such a denial is unjustified:

> "We are not unaware of the high probability that Franks, had he been classified I-A-O, would

nevertheless have refused induction and ultimately found himself indicted. . . . It is our view, however, that it was not for the local board, any more than it is for this Court, to say that the registrant should not be placed in a certain classification merely because he did not want that classification or was seeking a lower class or would probably refuse to acquiesce in such a classification." *Franks,* supra, page 269.

3) His views on self-defense are irrelevant.

This point, too, hardly needs argument but two minutes on it may be justified because the cases cited also bear on other points. It is true that there was a time, before this Court spoke in 1954 and the Supreme Court spoke in 1955, when it was believed by the Selective Service System, the Department of Justice, and many district judges that a conscientious objector, by definition, was required to be a pacifist; that a belief in self-defense negated the sincerity of the registrant's expressions of religious conscientious objection to participation in warfare. Although the 2d and 8th Circuits had the opportunity to lead the way[9] this Court held that the Act did not proscribe a belief in self-defense as soon as the question came before it. See *Clark vs. United States,* 217 F. 2d 511. In this [Roger] *Clark* decision this Court also eliminated war-connected work as a legitimate standard for denying a conscientious objector classification:

[9] *United States vs. Pekarski,* 207 F. 2d 930 (C.A. 2d 1953); *Taffs vs. United States, supra,* 331.

"The Hearing Officer believed that registrant was a sincere church member, but his statements on force and employment connected with war effort, in the Hearing Officer's opinion, precluded him from classification as a conscientious objector under the law. Accordingly, he recommended a I-A classification."

. . .

"It must be concluded that no portion of that which was thus before the appeal board furnished any basis for that board's rejection of a conscientious objector's exemption, at least so far as the conscientious objection to combatant military service is concerned."

Hinkle, Franks, and *Goetz,* all supra, are cited. Also see *Shepherd vs. United States,* 9th Cir., supra, and *Batelaan vs. United States,* 9th Cir., supra. These cases are additionally important to this appellant because of the holding that the existence of an illegal basis for the Department of Justice's recommendation to the appeal board tainted the classification, although there was also present in the files *express* disbeliefs in those registrants' honesty and sincerity. Appellant submits that his position is better than Shepherd's or Batelaan's, for no *classifying* agency expressed a disbelief in his honesty or sincerity. The expressions of disbelief in his sincerity by some of the faceless *informants* has been dealt with previously. On this point also see *Hagaman vs. United States,* supra.

4) Ownership of hunting equipment, etc., is also irrelevant.

Although there is only one appellate decision that has considered this narrow point, this Court's "self-defense" cases, [Roger] *Clark,* etc., supra, would seem to cover it. Appellant believes that only a vegetarian can logically require an unwillingness to take animal life for food as a basis for conscientious objection to participation in warfare.

The Tenth Circuit has squarely decided this point in *Rempel vs. United States,* 220 F. 2d 949:

> "And the hunting for wild game is not a circumstance having any probative force in respect to the lack of good faith of an asserted claim of exemption under the statute." [952].

5) Slackness in religious duties, is immaterial.

It is not necessary that a registrant be a regular attendant at church (or attend at all) to be a genuine conscientious objector. This Court has never passed squarely on the point, but it indicates in *Chernekoff vs. United States,* 219 F. 2d 721, that saintliness is not required of a registrant professing religious objection to war [724]. The Tenth Circuit came to the same conclusion in *Rempel vs. United States,* supra, at 951, citing *Chernekoff.* A district, court, however, has been squarely faced with this point. Judge Stephen W. Brennan, in *United States vs. Lewis C. Keefer,* N.D. N.Y., decided August 2, 1956, said:

> "The question here is the sincerity of the registrant's belief which must have been influenced by training and experience. Church membership, activity, or lack of them, are not determinative. (32 C.F.R. 1622.1(d); *Annett vs. U. S.,* 205 F. 2d 689)."

It is true that the witnesses require regularity in attendance and in missionary work of one who wants to be considered a witness, that is, *a minister of Jehovah*; however, as appellant himself stated, " . . . but that doesn't change the way I believe." [Ex 48]. It should need no argument that there is no *necessary* connection between regular church attendance and religious belief, for, as in this instance, one's vocation may preclude regular attendance. The non-sequitur nature of such a test was well summed up by District Judge John Paul in *United States vs. John Henry Showalter,* No. 8674, W.D. Va., decided December 3, 1952:

> "In comment on the above it may be said, in the first place that the court is unable to see any connection between holding conscientious convictions against engaging in war and drinking a bottle of beer or witnessing a moving picture. Even if this mild dissipation were considered as violating cardinal precepts of the Mennonite Church it does not follow at all that one indulging in them cannot adhere to others of its principles."

6) Unwillingness to accept either combatant or noncombatant duties.

The argument hereinabove presented, citing the *Franks* and *Kobil* cases, is adopted as appellant's argument on this point.

7) Unwillingness to perform I-O type work.

The argument hereinabove presented, under III 1), and the argument under III 2) citing the *Franks* and *Kobil* cases, are adopted as appellant's argument on this point.

8) Smoking and drinking.

The argument hereinabove presented, under III 5), is adopted as appellant's argument on this point.

Summary of Argument III: Appellant contends the record shows illegal bases alone were used in classifying him; his final contention, however, is that even where the record shows that a classification *may* have been based on a legal standard, it is illegal if the record also shows the possible use of an illegal standard and no explanation is given by the classifying authorities that rules out the use of illegal, erroneous interpretations of the applicable law; *Ypparila vs. United States,* 10th Cir., 219 F. 2d 465, 469, and this Court's *Shepherd,* supra, *Batelaan,* supra, and the opinion on the Petition for Rehearing in *Sheppard vs. United States,* 220 F. 2d 855, 856.

CONCLUSION

The judgment of the Court below should be reversed.

Respectfully submitted,

J. B. TIETZ,
Attorney for Appellant.

APPENDIX

December 19, 1956

National Headquarters
Selective Service System
1712 G Street, N.W.
Washington 25, D.C.

Gentlemen: Att: General Counsel

From time to time I represent selective service registrants who profess conscientious objections to war. It has been my observation that both your agency and the Department of Justice have changed the procedures somewhat, during the last past four years, with respect to the special appellate procedures for these registrants.

I have been attempting to establish the date, as accurately as possible, when they first were furnished with copies of the Attorney General's recommendation to the Appeal Board. I made an inquiry, addressed to the attention of Mr. T. Oscar Smith, Chief, Conscientious-Objector Section, as follows:

> " . . .
>
> "Please send me all subsequent changes and particularly the one or more that confirm my belief that the practice of sending copies of your recommendations to the Appeal Board started after the Gonzales (75 S.Ct. 409) decision. My purpose in asking for this particular item is to establish this as a fact."

His reply suggested that I "contact the Selective Service System for that information."

Very truly yours,
J. B. TIETZ

JBT:jc

JAN 7 1957

Mr. J. B. Tietz
Attorney at Law
410 Douglas Building
So. Spring and Third Streets
Los Angeles 12, California

Dear Mr. Tietz:

This is in reply to your letter of December 19, 1956, requesting information as to when registrants, who claim to be conscientious objectors and who appeal to the appeal board, were first furnished copies of the Department of Justice's recommendation prior to classification by the appeal board.

You are correct in assuming that this procedure was instituted as a result of the decision of the Supreme Court in the case of Gonzales v. United States, 348 U.S. 407, 75 S.Ct. 409. As a result of this decision the Selective Service Regulations were amended by Executive Order No. 10659 of February 15, 1956. Consequently, section 1626.25 (c) of the regulations now requires that the registrant be given an opportunity to reply to the recommendation of the Department of Justice prior to classification by the appeal board.

For The Director,
DANIEL O. OMER
DANIEL O. OMER
Colonel, JAGC
General Counsel